IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.8748 OF 2003

Dynandev Waman Walke.....Petitioner

Versus

1. State of Maharashtra & Ors...Respondents

Mr.J.S.Kini, for the Petitioner
Mr. J.S. Deo, for Respondent No.2.

CORAM: F.I. REBELLO J.
DATE : 10th January, 2005

P.C.:

. One Tukaram Waman Walke had filed a suit claiming various reliefs amongst others against the petitioner herein. That suit was decreed and it was held that Tukaram Waman Walke since deceased is entitled to 1/3rd share in the property, the property being ancestral. The proceedings thereafter were taken out in execution. During the pendency of the proceedings Waman expired. Petitioner and Tukaram are the sons of the aforesaid Waman. On behalf of the respondent No.2 who by then had been impleaded in the proceedings an application was moved that the share of Waman be divided equally amongst the heirs in the proportion of 1/3rd each. An order came to be passed to that effect on 14th February, 2002. It is after this order that the petitioner herein moved an application contending that there was a Will and by virtue of that Will Waman had willed away his rights in favour of his sons. Those sons filed a suit for probate which is pending. The case of the petitioner was that the share of Waman should

not be executed pending the proceedings for probate of the Will. The learned trial Court after considering the contentions was pleased to reject the application for stay. The learned Judge also observed that until the sons of the petitioner establish the title over the share of Waman they are not necessary parties to the present proceedings. Various applications, thereafter moved were rejected by the order dated 7th November, 2003 which is the subject matter of the present petition.

2. Considering the controversy as the petitioner himself does not claim absolute right in the share left by Waman and as the order of 14th February, 2002 has not been challenged in my opinion this would not be a fit case for this Court to interfere with the impugned order.

3. If at the highest those who are entitled under the Will claim any interest it is for them to pursue the remedy in the suit which is pending and if in law they are so entitled to. On behalf of the Respondent NO.2 learned Counsel states that the execution has been completed and 1/3rd share in Waman's property is in his possession and to that effect the survey records have already been mutated.

4. With the above observations Writ Petition disposed of. No order as to costs.

(F.I. REBELLO, J.)